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July 12, 2016

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

Re: Notice of *Ex Parte* Presentation, CG Docket No. 02-278

Dear Ms. Dortch:

This *Ex Parte* Notice covers several conversations with staff at the Commission, all in relation to the Commission's Declaratory Ruling¹ in response to the petitions by Broadnet Teleservices LLC, National Employment Network Association, and RTI International, in the above-named proceeding that was released on July 5, 2016. I spoke with Mark Stone of the Consumer and Governmental Affairs Bureau, John Williams of the Office of the General Counsel, Gigi Sohn and Diane Cornell of Chairman Wheeler's office, and Travis Litman and Jennifer Thompson of Commissioner Rosenworcel's office on July 8. On July 11, I spoke with Mark Stone and Gigi Sohn. On July 12, I spoke with Mark Stone, Kurt Schroeder and Gigi Sohn.

These conversations were on behalf of the low-income clients of the National Consumer Law Center, as well as Americans for Financial Reform, Center for Responsible Lending, Consumer Action, Consumer Federation of America, Consumer Union, National Association of Consumer Advocates, U.S. PIRG, and Young Invincibles.

During these conversations, we discussed the importance of the Commission's staying this Ruling and making essential changes to any Ruling it subsequently issues pursuant to these petitions.

¹ In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Petitions for Declaratory Ruling by Broadnet Teleservices LLC, National Employment Network Association, RTI International, Declaratory Ruling, FCC 16-72, CG Docket No. 02-278 (Rel. July 5, 2016) [hereinafter Broadnet Ruling], *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0706/FCC-16-72A1.pdf.

I. Introduction

The Commission's Declaratory Ruling [hereinafter Broadnet Ruling] determines that the federal government and contractors that are agents of the federal government are not "persons" under the Telephone Consumer Protection Act (TCPA)² and are thus not covered by the TCPA.³ This is an incorrect and very dangerous interpretation of the law. The TCPA unquestionably applies to contractors⁴ of the federal government, regardless of their agency status. If the Commission does not reconsider its Ruling in this proceeding, tens of millions of Americans will find their cell phones flooded with unwanted robocalls from federal contractors with no means of stopping these calls and no remedies to enforce their requests to stop these calls.

Congress has clearly indicated that the TCPA covers agents and contractors of the federal government, as evidenced by the passage of the 2015 Budget Act amendments exempting certain calls by such agents.⁵ And the case cited by the Commission as support for its Ruling, *Campbell-Ewald Co. v. Gomez*,⁶ a January 20, 2016 decision of the U.S. Supreme Court, actually clearly illustrates exactly the opposite—that federal contractors *are* always covered by the TCPA. In that case, the Supreme Court held that because the defendant federal contractor was alleged to have called telephone numbers without the called party's consent, contrary to the instructions of the federal agency that hired it, the contractor did not even enjoy the limited defense of qualified immunity, and could be held fully liable for the TCPA violations.

While the Supreme Court indicated that the "United States and its agencies, it is undisputed, are not subject to the TCPA's prohibitions because no statute lifts their immunity,"⁷ the Court found that contractors of the government (as distinct from agencies) have only a qualified immunity from suit. There was no discussion by the Supreme Court that these contractors were not persons covered by the TCPA, and both the *dicta* in the case and the ultimate holding clearly included such contractors within full coverage under the TCPA. Because the defendant contractor was alleged to have violated the TCPA, the Court allowed the lawsuit to proceed.

² 47 U.S.C. § 227.

³ "[W]e clarify that a government contractor who places calls on behalf of the federal government will be able to invoke the federal government's exception from the TCPA when the contractor has been validly authorized to act as the government's agent and is acting within the scope of its contractual relationship with the government, . . ." Broadnet Ruling at 9, ¶ 17.

⁴ There is some confusion about the difference, if any, between the terms "agents" and "contractors" of the federal government. The Broadnet Ruling talks about both contractors and agents, but applies its exempting language only to contractors who have an agency relationship with the federal government and are acting within the scope of that agency. The Supreme Court case, *Campbell-Ewald Co. v. Gomez*, refers generally to government contractors, and discusses agents only in the context of the defendant-contractor's potential liability for its subcontractor. 136 S. Ct. 663, 674 (2016). We recognize that the Commission may have intended for the Broadnet Ruling to apply only to those contractors who are acting within the scope of their agency relationship with the federal government.

⁵ Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 [hereinafter Budget Act].

⁶ 136 S. Ct. 663 (2016).

⁷ 136 S. Ct. at 672.

The immediate impact of the Broadnet Ruling’s statement that the TCPA does not apply to contractor-agents of the federal government is likely to be a significant increase in the number of unwanted robocalls to consumers from government contractors. These callers, relying on the language in the Broadnet Ruling, will make calls to cell phones both when they have consent to call and when they do not. If the TCPA does not apply to their actions, these callers will feel free to ignore clear revocations of consent to be called, as well as repeated requests to stop the calls. Indeed, these callers are likely to feel free to make robocalls to cell phones without any attempt to comply with the Commission’s rule on reassigned numbers.⁸

Moreover, if contractors are not “persons” under the TCPA, they will be able to call numbers that the called parties have never provided: there will be no prohibition against calling randomly-generated numbers or numbers obtained from database vendors. The prohibition against robocalls to emergency rooms, police and fire departments, poison control centers, and the like will be inapplicable to them. The Commission’s rules regarding technical and procedural standards for artificial voice calls, and the prohibition against caller ID spoofing, will not apply.

II. Facts and Arguments Offered in Support of Our Request

A. Summary

The Commission issued its Broadnet Ruling while it was in the middle of a congressionally-mandated rulemaking to implement the 2015 Budget Act amendments.⁹ By those amendments to the TCPA, Congress explicitly made two, and only two, provisions of the TCPA inapplicable to calls made to collect debts owed to or guaranteed by the United States.¹⁰ The amendments also provide that the Commission “may restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States,”¹¹ and they instruct the Commission to prescribe rules within nine months to implement the amendments.¹²

Despite the clear implications in the recent passage of the Budget Act amendments to the TCPA that Congress understands and intends that the TCPA apply to private-sector agents of the federal government, the Broadnet Ruling states that the “term ‘person’ as used in section 227(b)(1) . . . does not include the federal government or agents acting within the scope of their agency under common-law principles of agency.”¹³

The 2015 Budget Act amendments make it clear that the TCPA applies to federal contractors, as the amendments would not be necessary if the TCPA were not applicable. Further, the Supreme Court case cited by the Commission as support for its proposition states only that in

⁸ See *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd 7961, 7694, ¶¶ 85-93 (2015).

⁹ Broadnet Ruling at 12 n.96.

¹⁰ Budget Act § 301 (amending 47 U.S.C. § 227(b)(1)(A), (B)).

¹¹ Budget Act § 301(a)(2)(C) (amending [47 U.S.C. § 227\(b\)\(2\)\(H\)](#)).

¹² Budget Act § 301(b).

¹³ Broadnet Ruling at 5.

certain situations contractors are immune from suit when following instructions provided by the government. The case does not say that private contractors or agents are not "persons" and thus not covered by the TCPA, as the Broadnet Ruling mistakenly holds.

In any event, it is unquestionable that the implementation of the Budget Act amendments is intimately connected with the question of the extent to which the TCPA applies to federal contractors. It was an error for the Commission to issue the Broadnet Ruling while it was in the middle of the rulemaking to implement the Budget Act amendments. Without a full record for the Budget Act rulemaking, the Commission cannot evaluate the interplay between the Budget Act and the Broadnet petition. The Commission should withdraw the Broadnet Ruling, and should address the Broadnet questions only after it issues its Budget Act regulations.

The potential damage from the mistaken Broadnet order is huge, including:

- Government contractors could make robocalls at any time of day or night, in any number, and for any duration, as long as the calls are made pursuant to government instructions.
- Consumers would have no way to stop the robocalls from government contractors, as revocation of consent under the TCPA would no longer be applicable.
- All of the other protections of the TCPA, including the prohibitions against caller ID spoofing, against making robocalls to emergency rooms and police stations, and against making calls to randomly-generated or purchased lists of numbers, will not apply to these callers.

B. Millions of People Will be Harmed by the Ruling

The National Consumer Law Center represents low-income clients throughout the United States. Our clients live below or only slightly above the poverty level. Many of our clients have cell phones with limited minutes available; many owe debts to the United States; and many are disabled and are recipients of Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI). All of our clients have privacy interests in not being robocalled at inconvenient times and by people from whom they do not want to receive calls. All of our clients have an interest in their ability to control and stop unwanted robocalls.

The robocalls that the Broadnet petitioners seek to make will be unwelcome to most, if not all, consumers. Many, many consumers will view robocalls to announce town hall meetings and other political matters as unwanted, invasive, and aggravating. The Commission's Broadnet Ruling appears to mean that there will be no way for consumers to stop these calls, and no limits on the number, duration, or time of these calls. Similarly, disabled consumers should have the right to consent or decline to receive robocalls about services claiming to enable them to return to work. This is particularly true since many of these individuals, particularly those receiving SSI, are by definition low-income, and are likely to be using cell phones with limited minutes that they must preserve carefully in order to be able to communicate with the outside world. And as for surveys, many consumers find survey calls aggravating and intrusive.

For low-income consumers, especially, these calls must be—at the least—controlled. Many, if not most, of the households living below the poverty line rely on pay-as-you-go, limited-minute

prepaid wireless products. These wireless plans have been growing in use, especially among low-income consumers and consumers with poor credit profiles.¹⁴ They provide a fixed number of minutes and, often, a fixed number of texts. After these limits are exceeded, consumers must purchase a package of new minutes periodically to maintain their service. Consumers with such plans are often billed for incoming calls in addition to outgoing calls, making them very sensitive to repetitive incoming calls—especially calls that they do not want.

While there is no way to determine exactly how many individual prepaid users there are, an article authored in 2013 indicated that about one third of U.S. cell phone owners now opt to pay as they go.¹⁵ This works out to be over 62 million people in the U.S. using limited minute prepaid plans.¹⁶

Additionally, there are an estimated 13 million Americans who maintain essential telephone service through the federal Lifeline Assistance Program.¹⁷ Most of these Lifeline participants have service through a prepaid wireless Lifeline Program, which most commonly limits usage to only 250 minutes a month for the entire household.¹⁸

This means that there are over 75 million Americans who have limited minutes and texts on their cell phone plans. A flood of unwanted calls, regardless of the party for whom they are calling, would be devastating for households struggling to afford essential telephone service. Voluminous unwanted calls use up the minutes on which the entire household depends to access health care, transportation and other essential services, to find jobs or accept work assignments, to respond to family emergencies, to call police or fire departments, and to avoid social isolation.

The Commission's Broadnet Ruling does not acknowledge these concerns, which are the reasons the TCPA was enacted, but instead cites the petitioners' exaggerated claims about how the inability to make robocalls will do such things as prevent government agencies from collecting child support. Since the TCPA does not prevent government agencies from making regularly dialed calls staffed by humans, and since those calls are infinitely more effective in reaching people than robocalls, these claims are specious.

¹⁴ Federal Communications Commission, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Eighteenth Report, WT Docket No. 15-125, ¶¶ 44, 73, 95-96 (Dec. 23, 2015).

¹⁵ Marc Lifsher, *More cellphone users switch to prepaid plans* (Feb. 22, 2013), available at <http://phys.org/news/2013-02-cellphone-users-prepaid.html>.

¹⁶ Marrying that statistic to the Pew Research Center's estimate that, as of October 2014, cell phone ownership among adults was approximately 90 percent means that roughly 218,223,738 million adults own cell phones. *See* <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/>. Twenty-nine percent of that number is 63,284,884.

¹⁷ *See* Universal Service Administrative Company, LI08 Lifeline Subscribers by State or Jurisdiction - January 2015 through December 2015, available at <http://www.usac.org/about/tools/fcc/filings/2016/q2.aspx>.

¹⁸ *In re* Lifeline and Link Up Reform and Modernization, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, FCC 15-71, WC Docket Nos. 11-42, 09-197, 10-90, ¶ 16 (Rel. June 22, 2015).

C. The Commission Has Misinterpreted the Supreme Court's *Campbell-Ewald* Decision

The Commission has based the Broadnet Ruling on the Supreme Court's decision in *Campbell-Ewald Co. v. Gomez*.¹⁹ There, the Supreme Court upheld the Ninth Circuit's *reversal* of a District Court decision that a federal governmental contractor was immune from the TCPA. In reaching this decision, the opinion quotes another decision that held that, where the government's authority to carry out a project was validly conferred, there was no liability on the part of a contractor who simply performed as the government directed.²⁰ However, the Supreme Court did not apply that holding in this case. It noted that this finding of no liability was the result in the other case. In *Campbell-Ewald*, the Court held the opposite: the Court allowed the case to continue against the contractor, holding that because it violated the government's instructions, consistent with the TCPA, to limit the robocalls to persons who had consented to receive, the *reversal* of the District Court's decision that the contractor was immune should be upheld. But the whole discussion about when a federal government contractor would be immune if it acts within its authority and the authority was validly conferred is *dicta*, and not a firm ruling on the issue.²¹

But in any event, *Campbell-Ewald* provides *no* support for the Commission's determination that a federal government contractor is not a "person" as defined in the TCPA. There is absolutely no discussion in the case about whether contractor-agents of the federal government are persons covered by the TCPA. The entire discussion is about whether the defendant-contractor was entitled to immunity from suit. Indeed, if the contractor in *Campbell-Ewald* had not been a "person," then the TCPA would have been wholly inapplicable to it, and there would have been no need for the Supreme Court to consider whether it might have immunity from suit in some circumstances.

The distinction between granting government contractors immunity in some circumstances and writing them out of the scope of the TCPA is highly important. If a government contractor is not a "person," then the TCPA is wholly inapplicable to it. In paragraph 11 of the Broadnet Ruling, the Commission attempts to "emphasize that in each of these scenarios, a call placed by a third-party agent will be *immune* from TCPA liability only where (i) the call was placed pursuant to authority that was 'validly conferred' by the federal government, and (ii) the third party complied with the government's instructions and otherwise acted within the scope of his or her agency, in accord with federal common-law principles of agency."²² This language in the Commission's Ruling recognizes the limits on agents' immunities. But if the third-party agent is not a "person" subject to the TCPA, it will not need immunity and there will never be an occasion to apply the law of immunity to it. Moreover, in many other places the Commission seems not to recognize even these limits.²³

¹⁹ 136 S. Ct. 663 (2016).

²⁰ *Id.* at 673 (citations omitted).

²¹ *Id.*

²² Broadnet Ruling at 6 (emphasis added).

²³ Such as in paragraph 16: "We also clarify that the term "person" in section 227(b)(1) does not include a contractor when acting on behalf of the federal government, as long as the contractor is acting as the government's agent in accord with the federal common law of agency." Broadnet Ruling at 8.

The Supreme Court held specifically that government contractors do *not* have absolute protection from TCPA liability. There was no question in that case that they were “persons” covered by the TCPA. The Commission has conflated the concept of limited immunity from lawsuits under the TCPA with no coverage under it whatsoever.

The limited immunity described by the Supreme Court in *Campbell-Ewald* is far narrower than potentially excluding government contractors from coverage under the TCPA altogether. The Commission’s decision is not mandated by *Campbell-Ewald* and, in fact, runs directly contrary to it. The bottom line is that the U.S. Supreme Court found that the government contractor could be held liable under the TCPA. If the Court had taken the position articulated in the Commission’s Broadnet Ruling, it would have said that the only issue with respect to avoiding liability was whether the contractor was acting as an agent of the federal government.

There are three situations in which a government contractor could have violated the TCPA, each of which clearly leads to its potential liability under the TCPA.

1. The government tells the contractor to comply with the TCPA and it does not. This situation is exactly the one described by the Supreme Court in *Campbell-Ewald*. Here, the Court found that the contractor could be held liable; it did not enjoy any immunity that would protect it from suit. There was no discussion of whether the contractor was a person covered by the TCPA; rather, there was only an articulation of the double test as to whether the contractor violated federal law and the government’s explicit instructions.²⁴

2. The government says nothing about complying with the TCPA in the contract, and the contractor violates the TCPA. The law applicable to the situation is incorporated into a contract.²⁵ So, but for confusion that might grow out of the Commission’s misguided Declaratory Ruling in Broadnet, the TCPA would automatically apply to every contract between the United States government and its contractors relating to calls covered by the TCPA.

In *Campbell-Ewald*, the Court cites the case of *Filarsky v. Delia*,²⁶ while noting that case’s admonition that “[q]ualified immunity may be overcome, however, if the defendant knew or should

²⁴ “When a contractor violates both federal law and the Government’s explicit instructions, as here alleged, no ‘derivative immunity’ shields the contractor from suit by persons adversely affected by the violation.” 136 S. Ct. at 672.

²⁵ See, e.g., *In re Doctors Hosp. of Hyde Park*, 337 F.3d 951, 959 (7th Cir. 2003) (“We do not have the situation in which a statute is so far afield of matters of normal interest to contracting parties that they would not have thought it would affect the terms of their contract... It is conceivable that such statutes would not be deemed to create implied contractual terms, though unlikely in view of such commonplace judicial remarks as that ‘as a general principle of contract law, statutes and laws in existence at the time a contract is executed are considered part of the contract. It is presumed that parties contract with knowledge of the existing law.’”) (citations omitted)); *Alpha Beta Food Markets v. Retail Clerks Union Local 770*, 291 P.2d 433, 437 (Cal. 1955) (citing the “general rule that ‘all applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have had in mind, necessarily enter into the contract and form a part of it, without any stipulation to that effect, as if they were expressly referred to and incorporated.’”(citation omitted)). Cf. *Bank of America, N.A. v. Moglia*, 330 F.3d 942, 948 (7th Cir. 2003); *Schiro v. W.E. Gould & Co.*, 165 N.E.2d 286, 290 (Ill. 1960).

²⁶ 132 S. Ct. 1657 (2012). This admonition derived from another United States Supreme Court case, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), in which the Court held that “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” 475 U.S. at 818.

have known that his conduct violated a right ‘clearly established’ at the time of the episode in suit.”²⁷ Applying the words from the *Filarsky* case and previous decisions, the Court observed that the government contractor in the *Campbell-Ewald* matter did not “contend that the TCPA’s requirements or the Navy’s instructions failed to qualify as ‘clearly established.’”²⁸

The Court’s observation demonstrates that where a contractor knows or should have known that its conduct violated “clearly established” statutory rights, derivative or qualified immunity will not rescue the contractor from liability. This rule applies even where a contract does not explicitly direct compliance with a given statute, such as the TCPA, because a contractor in the business of making calls or sending text messages to consumers surely knows, or should know, the bounds and strictures of the TCPA.²⁹

It is also important to note that in *Campbell-Ewald* the Court employs the disjunctive conjunction “or” in her observation: “Campbell does not here contend that the TCPA’s requirements *or* the Navy’s instructions failed to qualify as ‘clearly established.’”³⁰ This usage makes clear that the “clearly established” statutory rights need not be explicitly set out in the instructions contained in the contract between the contractor and the government as well as the statute. The fact that the rights are contained in the TCPA itself is enough to qualify them as “clearly established.” Thus the *Campbell-Ewald* case clearly shows that the governmental contractor that violates the TCPA, even if the contract does not specifically require compliance, would not be entitled to qualified immunity, and would instead be liable for its violations.³¹

3. The government includes in its contract instructions to the contractor to violate the TCPA. Here, too, the *Campbell-Ewald* decision is instructive. The Court notes that there is a two-prong test for the contractor to escape liability under qualified immunity. When it performs as instructed by the government, the instructions had to be “validly conferred.”³² The Court explicitly notes that when either the contractor had “exceeded his authority” or the authority was not “validly conferred,” the contractor would be liable for conduct that caused the injury.³³ A government contract that instructs an agent to violate an applicable federal law, such as the TCPA, would not provide authority that was “validly conferred.”

²⁷ 136 S. Ct. 663, 673 (2106) (citing *Filarsky v. Delia*, 132 S. Ct. 1657, 1668 (Ginsburg, J., concurring)).

²⁸ *Id.*

²⁹ After all, this statute, enacted in 1991, sets forth the governing rules and regulations that permit and proscribe conduct relating to robocalls and text messages. An entity in the business of making these kinds of contacts could hardly remain in business without some form of familiarity or basic awareness of its contents.

³⁰ 136 S. Ct. at 673.

³¹ Similarly, where a contract sets forth the general directive for a contractor to make calls, but does not contain a specific directive to adhere to the TCPA’s requirements, the contractor would be exceeding the authority granted by the contract, and derivative sovereign immunity would therefore be inapplicable. *See, e.g., Anchorage v. Integrated Concepts & Research Corp.*, 1 F. Supp. 1001 (D. Alaska 2014) (where contract contained a Statement of Work describing broadly the project responsibilities, and the contractor’s independent acts caused the damages complained of, not any directives from the governmental agency, dismissal of derivative sovereign immunity defense was appropriate).

³² 136 S. Ct. at 673.

³³ *Id.*

All three of these examples indicate that, under the United States Supreme Court’s analysis, government contractors violating the TCPA would be responsible for compliance with the TCPA. The Commission’s Broadnet Ruling however, significantly muddies this clear set of rules.

D. The TCPA *Does* Apply to Government Agents

The Commission’s Broadnet Ruling is wrong for another reason: the TCPA clearly *does* apply to federal government contractors, even if they are acting as agents. This is apparent from the language of the statute itself.

First, nothing in the statute excludes government contractors or agents. While there is well-established decisional law excluding the United States itself from statutes unless the statute is explicit in applying to the government, there is no support in these cases for excluding government agents or contractors. *Campbell-Ewald* makes this clear: it holds that, while the United States and its agencies are not subject to the TCPA’s prohibitions because no statute lifts their immunity,³⁴ federal government contractors do not share this immunity.

Second, the TCPA provides:

This subsection [the prohibition on provision of inaccurate caller ID information] does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States.³⁵

The caller ID falsification provision, like the robocall prohibition, provides that “[i]t shall be unlawful for *any person* to” violation the prohibition.³⁶ If a person performing government activities were not a “person” subject to the TCPA, there would be no need for this exception.

Third, even if the TCPA’s applicability to federal government contractors and agents were not already clear, the 2015 Budget Act amendments make the issue indisputable. If government agents and contractors were not generally subject to the TCPA, there would be no need to exempt certain government contractors—those collecting federal debts—from the prohibitions against robocalls to cell phones and residential lines. The fact that Congress excluded these contractors from just two of the many provisions of the TCPA is also telling, as it shows that the TCPA applies fully to government contractors except where they are specifically exempted. (Indeed, since *Campbell-Ewald* arose under the pre-Budget Act version of the TCPA, even its statements about the limited immunity of federal contractors may no longer be valid in reference to activities covered by the Budget Act provision.)

Moreover, the Budget Act amendments give the Commission the authority *under the TCPA* to adopt regulations limiting the number and duration of robocalls that can be made to collect a

³⁴ 136 S. Ct. at 672.

³⁵ 47 U.S.C. § 227(e)(7).

³⁶ 47 U.S.C. § 227(b)(1)(A), (B), (e)(1).

federal government debt. The Commission's authority to prescribe rules for the calls allowed by the Budget Act is found in § 226(b)(2)(H) of the TCPA:

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission— ... (H) may restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States. (emphasis added)

Since “this subsection,” *i.e.* § 226(b), only restricts the activities of “persons” governed by the TCPA, any rules the Commission adopts would not apply to government contractor collectors of federal debts if all government contractors are excluded from the subsection's robocall prohibitions. If federal government contractors that meet the agency test are not subject to the TCPA generally, and are exempt only to the extent that they fall within the Budget Act exemptions and comply with the Commission's rules, this provision would make no sense.

In footnote 96 of the Broadnet Ruling, the Commission suggests that Congress, when it adopted the Budget Act amendments, expected that the Commission would not implement the amendment because it would exclude government contractors altogether in its ruling on the Broadnet petition.³⁷ This would be an unprecedented position for Congress to take, and it is entirely inconsistent with what Congress did when it created an exemption only from two particular prohibitions and required the Commission to adopt rules to implement that amendment.

E. The Commission Lacks Statutory Authority to Define “Person” to Exclude Federal Contractors

In the TCPA, Congress gave the Commission authority to adopt rules in certain areas. The Commission's only authority to create exemptions from the TCPA's requirements is:

- To exempt artificial voice calls to residential lines that are not made for a commercial purpose or that will not adversely affect privacy rights and that do not include an unsolicited advertisement.³⁸
- To exempt robocalls to cell phones that are not charged to the called party, subject to provisions to protect the called party's privacy rights.³⁹

³⁷ “[T]his item does not mean that Congress's recent decision to except calls ‘made solely to collect a debt owed to or guaranteed by the United States’ from the prior express consent requirement, see Bipartisan Budget Act of 2015 § 301, Pub. L. No. 114-74, 129 Stat. 584, 588 (Budget Act), was unnecessary. ... [A]t the time Congress enacted that amendment the Commission had not yet determined whether federal government contractors are subject to the TCPA, so the amendment was not redundant or pointless, but instead served to guarantee that callers covered by the amendment would be excepted from the consent requirement no matter how the Commission eventually resolved the question in this proceeding.”

³⁸ 47 U.S.C. § 227(b)(2)(B).

³⁹ 47 U.S.C. § 227(b)(2)(C).

- To exempt certain tax-exempt nonprofit organizations from certain requirements regarding the transmission of faxes.⁴⁰

The Commission has no authority to adopt a general exemption for classes of callers. Thus, its definition of “person” to exclude federal government contractors goes beyond its statutory exemption authority.

III. Recommendations for Changes to the Broadnet Ruling

We urge the Commission to reject the three petitions that prompted this proceeding. The three petitioners have not made a case for abandoning the TCPA’s protections for these non-emergency calls, and the Petitioners have an array of other ways to reach people. Indeed, the ruling that the Petitioners seek would be, in the long term, a disservice to the interests of the federal government. Robocalls by government contractors to persons who do not want to receive them, and cannot stop them, may be more convenient and expedient for these contractors, but will risk causing anger and disenchantment with the government. For low-income consumers who have limited-minute or prepaid plans, these calls will amount to an additional federal tax.

If, however, the Commission believes that it is appropriate to allow the types of calls described in these three petitions to be made to cell phones without consent, the Commission has the power to allow these calls only if they are free to the end user, pursuant to 47 U.S.C. § 227(b)(2)(C), and subject to provisions to protect the called party’s privacy rights. We urge the Commission to evaluate providing the relief sought by the Petitioners via this route, rather than by defining them out of the TCPA altogether. Additionally, the Commission should add essential consumer privacy protections. These protections should include:

1. A limit on the number of these calls permitted to be made by the callers per month (or per year). For example, the National Employment Network Association “asserts that the maximum number of contacts to each beneficiary should be limited to four per year, unless the beneficiary opts out first.”⁴¹
2. Callers should be required to offer consumers the right to opt out of future calls, and then should be required to stop calling those consumers once they have requested the calls to stop.
3. Calls should be permitted only between 8 a.m. and 9 p.m, according to the called party’s time zone.
4. Voice mail messages should be of limited duration and texts should be of limited length.
5. Limitations for calls made to reassigned numbers should be applicable.

IV. Request for Immediate Stay of the Broadnet Ruling

As described above in the Introduction, the Broadnet Ruling will undoubtedly cause an immediate increase in the number of unwanted robocalls to consumers from contractor-agents of

⁴⁰ 47 U.S.C. § 227(b)(2)(F).

⁴¹ Public Notice, Federal Communications Commission, Consumer and Governmental Affairs Bureau Request for Comment on National Employment Network Association Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 2 (released Sept. 19, 2014), available at <https://www.fcc.gov/ecfs/filing/6019372713/document/7522902874>.

the federal government. These calls are not likely to be limited to the types of calls specifically addressed in the Ruling. Because of the expansive language in the Ruling, calls from debt collectors will likely also be increased, whether or not the callers have consent from consumers.

If all contractors and agents of the federal government are exempted from the TCPA by the Broadnet Ruling, then the regulations pursuant to the Budget Act amendments provide the only governance of robocalls for debt collectors collecting federal debt. And the Budget Act amendments, by their terms, only authorize regulations to implement the requirements of § 226(b), which applies only to “persons.” If all federal government contractors are excluded from the definition of “person,” then not only will these callers be entirely exempt from all the general provisions of the TCPA, but any Budget Act regulations, no matter how carefully crafted, will also not apply to them.

For these and the other reasons outlined in this Petition, we have asked that the Commission issue an immediate order staying the Broadnet Ruling.

Respectfully submitted,

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